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Supreme Court, U.S.
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No. 00-1045

IN THE
Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

DANIEL J. MCLOON
EUGENIA L. CASTRUCCIO
JONES, DAY, REAVIS & POGUE
555 West Fifth Street
Suite 4600
Los Angeles, CA 90013
(213) 489-3939

DANIEL H. BROMBERG
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioner

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QUESTION PRESENTED

Whether Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681p, contains an implicit exception incorporating the discovery rule that permits a suit for violation of the Act to be brought within two years of the date of the discovery of injury even in the absence of any willful misrepresentation.

PARTIES TO THE PROCEEDING

The only parties before the United States Court of Appeals for the Ninth Circuit were petitioner TRW Inc. and respondent Adelaide Andrews. TRW is publicly owned and has no parent corporations. The subsidiaries and affiliates of TRW that are not wholly owned by it are listed in the petition for a writ of certiorari. Before the United States District Court for the Central District of California, Trans Union LLC was also a party to this case.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended (Pet. App. 1a), is reported at 225 F.3d 1063. The opinion of the district court (Pet. App. 10a) is reported at 7 F. Supp. 2d 1056.

JURISDICTION

The Ninth Circuit issued its opinion and entered judgment in this case on July 17, 2000. After denying each party's petition for rehearing or rehearing en banc, the Ninth Circuit amended its opinion on October 4, 2000. The petition for a writ of certiorari was filed on December 22, 2000 and granted on March 5, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, provides in full:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p. Other portions of the Act, as amended, are reprinted at J.A. 32-88.[1]

STATEMENT

This case concerns the statute of limitations governing the private rights of actions created by the Fair Credit Reporting Act (the "FCRA" or the "Act"), as amended, 15 U.S.C. § 1681 *et seq*. Section 618 of the Act requires that such actions normally be brought "within two years from the date on which liability arises." *Id*. § 1681p. That section also contains an express exception for willful misrepresentations of information required by the Act to be disclosed. Under that exception, when such misrepresentations material to a claim under the Act are made, that claim may be brought "within two years after discovery by the individual of the misrepresentation." *Id*. The question presented here is whether a broader discovery rule, which would be applicable to all claims even in the absence of the willful misrepresentation expressly required by Congress, can also be implied into Section 618.

The Fair Credit Reporting Act—Petitioner TRW Inc. is the former owner of one of the three national credit bureaus, all of which maintain computer files on the credit history of most Americans. Pet. App. 13a-14a & n.3.[2] As Congress has recognized, *see* 15 U.S.C. § 1681(a)(3), credit bureaus and other consumer reporting agencies play a vital role in making credit available to American consumers, and in facilitating credit, insurance and employment decisions, by providing reports that help their users gauge the risk of extending credit, insurance, or employment to a consumer. *See, e.g.*, William P.

[1] Because some of the documents material to the claims before this Court were filed under seal, the parties have lodged with the Court a supplemental sealed joint appendix, designated as "S.J.A." in addition to the regular joint appendix ("J.A.").

[2] On September 19, 1996, Experian Information Solutions, Inc. assumed control over petitioner's former credit reporting business. Petitioner no longer retains any interest in that business. SER 825.

Ogburn, *Fair Credit Reporting Act* § 1.2, at 27 (1998). In fact, approximately two million credit reports are purchased every work day. *See id*. Consumers can, however, be denied credit or other opportunities due to inaccurate reports, and they therefore have an interest in keeping the information in those reports private, especially if the reports go beyond the information concerning purchases and payments contained in ordinary credit reports to include information on their personal habits and characteristics. Accordingly, in 1970, Congress passed the Fair Credit Reporting Act, which was revised extensively in 1996, *see* Pub. L. No. 104-208, §§ 2401-22, 110 Stat. 3009-396 to 462 (1996), to regulate the credit reporting industry.

The FCRA strikes a balance between the interests of consumers in accuracy and privacy on the one hand and the needs of the credit reporting industry and the credit information users it serves on the other by requiring reporting agencies to "adopt reasonable procedures" to ensure accuracy, confidentiality, and proper utilization of the information they collect. 15 U.S.C. § 1681b. For example, the Act permits credit reporting agencies to furnish consumer reports only for "permissible purposes" specified in the Act. *Id*. § 1681b. The FCRA also requires such agencies to "follow reasonable procedures to assure maximum possible accuracy" of information in reports they provide, *id*. § 1681e(b), and it generally prohibits agencies from disclosing certain obsolete information, *see id*. § 1681c(a). In addition, the Act permits consumers to dispute the accuracy of information in their files,[3]

[3] The word "file" is a term of art under the FCRA covering "all of the information on [a] consumer recorded and retained by a computer reporting agency." 15 U.S.C. § 1681a(g). During the time period relevant here, petitioner did not maintain actual files on consumers; instead, it stored credit information organized by "trade lines," computerized information on individual credit accounts linked to consumer identification information. SER 841-42. For the sake of convenience, however, this brief uses the term file in its broad sense under

and it requires agencies to reinvestigate challenged information, promptly inform consumers of the results of the reinvestigation, and provide notice of any reinsertion of such information. *See id.* §§ 1681i(a), (d); *see also id.* § 1681i(b) (permitting consumers to place statements disputing challenged information in their files).

The FCRA also contains notice and access provisions that enable consumers to review the files maintained on them and entitles them to notice of disclosures of those files as well as any adverse actions taken as a result of those disclosures. For example, the Act requires that a consumer be notified whenever a report on that consumer is requested for employment purposes. *See* 15 U.S.C. § 1681b(b). Notification is also required when an "investigative consumer report" containing information about a consumer's reputation, character, and other highly personal matters is requested for any purpose. *See id.* § 1681(d)(1); *see also id.* § 1681a(e) (defining investigative report). Perhaps even more importantly, the Act requires notification when any "adverse action" is taken in whole or in part based upon information contained in a consumer report. *See id.* § 1681m(a); *see also id.* § 1681a(k) (defining "adverse action"). Finally, the FCRA gives consumers the right to request the information in their files, the sources used in compiling that information, the identities of the parties recently receiving credit reports on them, and other information. *See id.* § 1681g(a).

In addition to providing for administrative enforcement and criminal penalties, *see* 15 U.S.C. §§ 1681q-1681r, the FCRA provides specialized remedies for violations of the Act. For negligent violations, the Act creates a private right of action for damages sustained as the result of the violation, which entitles successful plaintiffs to attorney's fees. *See id.* § 1681o. The Act also creates a right of action for willful violations, which provides for statutory and punitive damages as well as

the Act to encompass such information.

compensatory damages and attorney's fees. *See id.* § 1681n. The limitations period in Section 618 governs the Act's private rights of action. *See id.* § 1681p.

The Imposter and the Disclosure of Respondent's Credit Records—This case arises out of an apparently innocuous visit to a doctor's office. On June 17, 1993, respondent Adelaide Andrews went to the office of a radiologist for an x-ray. Pet. App. 16a; SER 866. Because she had not been to that office before, she filled out a patient information form, listing personal information such as her birth date, social security number, and driver's license number. Pet. App. 16a; S.J.A. 46. Respondent then handed the form to a receptionist named *Andrea* Andrews, who unbeknownst to respondent at some point took the information in the form, moved to Las Vegas, and began impersonating respondent. Pet. App. 16a.

Using respondent's social security and driver's license numbers as well as a conglomeration of respondent's and her own name, the imposter rented an apartment and obtained both telephone and electric service. Pet. App. 16a. Even more importantly for present purposes, the imposter also made several attempts to obtain credit and services using respondent's identity. For example, on July 25, 1994, the imposter applied for credit with FirstConsumers National Bank (FCNB) using respondent's social security number and birth date. Pet. App. 2a, 17a. In response, the bank requested a credit report, and petitioner provided FCNB with information from respondent's file. Pet. App. 17a; S.J.A. 47-49. After reviewing the report from petitioner, FCNB denied the imposter's application. Pet. App. 17a-18a. In addition, on September 27, 1994, the imposter applied for cable service from Prime Cable of Las Vegas using respondent's social security number. Pet. App. 17a. As a locally sanctioned monopoly providing cable services, Prime Cable was required by local law to provide television service to all residents of its franchise areas and did open a cable account at the imposter's

Las Vegas residence. *See* Clark County, Nev., Code § 6.120.200(E) (1994) (SER 1051-52). Nevertheless, Prime Cable also requested a credit report, and petitioner once again provided information from respondent's file. Pet. App. 17a.

Subsequently, the imposter applied for credit with other companies, which similarly requested credit reports and petitioner again provided information from respondent's file. Pet. App. 17a; S.J.A. 52-62. These applications were likewise denied. Pet. App. 17a-18a; S.J.A. 50-52, 57. In October 1994, however, the imposter applied for credit at Dillard's department store using respondent's social security number, and Dillard's requested a credit report from Trans Union, another national credit bureau. Pet. App. 16a. Trans Union provided credit information from respondent's Trans Union file to the store, which granted the imposter credit. Pet. App. 16a-17a. The imposter's account with Dillard's eventually became delinquent. Pet. App. 17a. The imposter also failed to pay her cable bills or make her rent payments, and both accounts were eventually referred for collection. ER 75-80, 139-40; SER 883.

Respondent's Discovery of the Disclosures—In late May and early June 1995, respondent discovered the imposter's activities and the resulting disclosures of her credit records. The sequence of events began on May 31, 1995, when respondent went to a lending institution to inquire about refinancing her home mortgage. Pet. App. 18a. The institution ran a routine check on her credit with a credit reporting agency which assembled information from the three national credit bureaus at that time, Equifax, Trans Union, and petitioner TRW. *Id.* The report, which was shown to respondent, listed the imposter's delinquent Dillard's account. *Id.* Respondent then decided not to apply for refinancing from the lending institution and eventually obtained an equity line from Merrill Lynch, allegedly at a higher rate. *Id.*

That same day, respondent contacted petitioner and requested disclosure of all information in her file with petitioner. ER 133-34; S.J.A. 68-81. The disclosure provided to petitioner, which was printed on May 31, 1995, showed the Dillard's account (although not as delinquent) as well as listings of parties recently receiving credit reports on respondent. S.J.A. 72, 74-78. After reviewing the disclosure, respondent recognized that credit reports had been issued to FCNB, Prime Cable, and others based upon applications by someone else, and she contacted Dillard's, the Las Vegas Police Department, and petitioner's fraud department. S.J.A. 75; ER 133-36. By June 6, 1995, less than a week after being alerted to the problem, respondent had pieced together that Andrea Andrews was impersonating her in Las Vegas and sent out a letter informing various businesses of the imposter's activities. ER 123-24; SER 891-94. When respondent requested that petitioner delete all references to the imposter's activities, petitioner did so. Pet. App. 3a, 18a-19a.

The Proceedings Below—On October 21, 1996, almost seventeen months after discovering the imposter's activities, and more than two years after petitioner's disclosures of respondent's file to FCNB and Prime Cable, respondent sued both petitioner and Trans Union in district court. J.A. 1, 8-20. Respondent claimed that petitioner had violated the Act by disclosing those reports in connection with the imposter's activities. J.A. 15-16. Respondent also alleged that petitioner had violated the FCRA by erroneously including the imposter's account with Dillard's in her file. J.A. 16-17. In addition, respondent claimed that Trans Union had prepared inaccurate credit reports, made unauthorized disclosures of her file and, unlike petitioner, failed to reinvestigate and correct the information in that file reflecting the imposter's activities. J.A. 17-18; *see also* J.A. 18-19 (noting companion state law claims against both petitioner and Trans Union).

Prior to trial, petitioner moved for partial summary judgment on the improper disclosure claims. The district court found that the claims based upon the FCNB and Prime Cable disclosures were barred by the FCRA's statute of limitations because they were brought more than two years after the disclosures and respondent did not claim that there had been any misrepresentations of information required to be disclosed to her under the Act. Pet. App. 22a-25a. Although respondent claimed that the running of the statute of limitations was delayed until May 1995, when she discovered the disclosures, the district court disagreed. Pet. App. 23a. Following the reasoning of four circuits—including the Ninth Circuit's decision in an unpublished opinion (*see* Pet. App. at 23a-24a & n.6; *see also Allen v. Equifax Credit Info. Serv., Inc.*, No. 94-35074, 1995 WL 21422, at *1 (9th Cir. Jan. 19, 1995))— the court reasoned that the plain language of Section 618 did not incorporate a general discovery rule and that the section's explicit exception for misrepresentations precluded the implication of an additional, unstated, and more general exception. Pet. App. 23a-24a. The district court also rejected the remaining disclosure claims on the merits and entered partial summary judgment on the disclosure claims. Pet. App. 24a-34a.

Once Trans Union settled the claims remaining against it, the case went to trial on the inaccuracy claims against petitioner. J.A. 5-6. At trial, petitioner presented testimony showing that the credit records of a single individual will often have variations in them reflecting, for example, nicknames used by individuals, misspellings, and new addresses, often originating from different states. ER 701-02, 709, 717-25. Petitioner also presented evidence about the matching algorithms that petitioner has developed to accommodate these and other variations in an individual's credit profile. ER 704-25. Persuaded that the matching procedures that led to the inclusion of the imposter's activities in respondent's file were

reasonable, the jury rendered a verdict in favor of petitioner on the inaccuracy claims. Pet. App. 5a.

On appeal, the Ninth Circuit affirmed the jury's verdict on the inaccuracy claims, but vacated the district court's grant of partial summary judgment on the improper disclosure claims. Pet. App. 1a-2a. In reversing the district court's ruling on the statute of limitations, the court of appeals relied upon what it characterized as the "general federal rule that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured." Pet. App. 5a. According to the Ninth Circuit, this rule is read into every federal statute "unless Congress has expressly legislated otherwise." Pet. App. 6a. Although the court of appeals acknowledged that three circuits had found that Section 618's explicit misrepresentation exception precluded the implication of a general discovery rule, the Ninth Circuit asserted that these cases disregarded the teachings of this Court. *Id.* The Ninth Circuit did not attempt to derive its general discovery rule from the language of Section 618, the overall structure of the FCRA, or the history of the Act.

SUMMARY OF ARGUMENT

The vast majority of courts, commentators, and agencies to consider whether the statute of limitations in Section 618 of the Fair Credit Reporting Act incorporates an implicit discovery rule applicable to all claims under the Act have concluded that it does not. In holding otherwise, the Ninth Circuit erred.

1. Traditionally, statutes of limitations in general and the statutes governing credit reporting claims in particular began to run when the plaintiff has a complete cause of action. *See, e.g., Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874). Far from departing from this rule and commencing the limitations period upon discovery of injury or any other fact, Section 618 states that the limitations period begins to run when "liability arises." 15

U.S.C. § 1681p; *see also Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (treating similar language as incorporating the traditional rule); *McMahon v. United States*, 342 U.S. 25, 26 (1951) (same). As Congress has enacted dozens of statutes with express discovery provisions, it cannot be deemed to have implicitly incorporated a general discovery rule when it uses language clearly and precisely expressing the traditional commencement rule.

A general discovery rule is also precluded by the limited discovery provision Congress expressly incorporated into Section 618. Under that exception, when certain misrepresentations are made, the discovery provision delays the running of the limitations period until those misrepresentations are discovered. *See* 15 U.S.C. § 1681p. As this Court has recognized in interpreting statutes of limitations and other legislation, the presence of such an express exception normally precludes the implication of any unstated exceptions. *See, e.g., United States v. Brockamp*, 519 U.S. 347, 351-52 (1997); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616 (1980). Moreover, this principle applies with special force here because the generally applicable discovery rule that the Ninth Circuit implied into Section 618 would effectively render the limited discovery provision that Congress expressly included in the statute superfluous. Thus, the plain language of Section 618 precludes the implication of the broad discovery rule adopted in the decision below.

2. The general discovery rule adopted below conflicts with the overall structure of the FCRA. The Act provides consumers wishing to bring claims under the Act with a number of rights not previously afforded by state law, which enable them to discover credit reporting claims quickly and easily. Specifically, the Act contains provisions requiring notification to consumers about the disclosure and use of their credit information, *see, e.g.*, 15 U.S.C. §§ 1681b(b), 1681d(1),

1681m(a), and it entitles consumers to access their credit files and review all information kept in them as well as the identities of parties receiving reports on the consumer, *see id.* § 1681g(a). These carefully crafted provisions make a judicially-implied rule commencing the statute of limitations upon discovery unnecessary and inappropriate. Indeed, such a rule would upset the balance struck by Congress, significantly reducing the value of the limitations period to the defendants Congress intended to protect while affording little benefit to consumers beyond a class of claims that Congress has deemed relatively insignificant. *See id.* § 1681g(3)(A) (providing for only temporary retention of records material to improper disclosure claims).

3. The decision below also conflicts with the history of the Act. In the hearings that eventually led to the FCRA, a general discovery rule was specifically suggested, but Congress chose not to adopt it. Moreover, while respondent contends that the adding the misrepresentation exception also introduced a general discovery rule, there is no mention of such a change in the legislative history. Finally, although Congress extensively revised the FCRA in 1996, it did not revise Section 618, thereby indicating its acceptance of the then-unanimous view of the courts of appeals that the section does not implicitly incorporate a general discovery rule.

4. The decision below is not saved by the novel presumption applied by the Ninth Circuit. The Ninth Circuit justified its implication of a general discovery rule based upon a presumption that the rule applies to explicit statutes of limitations "unless Congress has expressly legislated otherwise." Pet. App. 6a. This presumption conflicts with this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and with Congress' practice of expressly including discovery provisions in statutes of limitations. Moreover, the evidence of Congress' intent found in the text, structure, and history of the Act is more than

sufficient to overcome any presumption, no matter how stringent. Indeed, the Ninth Circuit failed to offer any plausible construction of the language of Section 618 incorporating a general discovery rule.

ARGUMENT

Prior to the decision below, nearly every court of appeals,[4] district court,[5] agency,[6] and commentator[7] to consider the

[4] *See Allen v. Equifax Credit Info. Servs., Inc.*, 1995 WL 21422, at *1 (9th Cir. Jan. 19, 1995); *Jones v. One Valley Bank*, No. 92-2583, 1993 WL 264571, at *1 (4th Cir. July 14, 1993) (per curiam); *Clark v. State Farm Fire Cas. Ins. Co.*, 54 F.3d 669, 671-72 (10th Cir. 1995); *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989); *Houghton v. Ins. Crime Prevention Inst.*, 795 F.2d 322, 325 (3d Cir. 1986); *Clay v. Equifax, Inc.*, 762 F.2d 952, 960 (11th Cir. 1985); *see also Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448-49 (5th Cir. 1988) (holding that, in the absence of "intentional non-compliance" with the Act, the statute of limitations begins to run upon injury).

[5] *See Parker v. Parker*, No. A. 99-D-472-N, 2000 WL 1641267, at *4-5 (M.D. Ala. Sept. 21, 2000); *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669-71 (C.D. Cal. 2000); *Dornhecker v. Ameritech Corp.*, 99 F. Supp. 2d 918, 927-28 (N.D. Ill. 2000); *Gill v. Kostroff*, No. 98-930-CIV-T-17A, 2000 WL 141258, at *3-6 (M.D. Fla. Feb. 8, 2000); *Barron v. Trans Union Corp.*, 82 F. Supp. 2d 1288, 1293-94 (M.D. Ala. 2000); *McNamara v. Guazzoni*, No. 98 CIV 4085(HB), 1999 WL 322648, at *4 (S.D.N.Y. May 20, 1999); *Natale v. TRW Inc.*, No. C 97-3661 CRB, 1999 WL 179678, at *2 (N.D. Cal. Mar. 30, 1999); *Matise v. Trans Union Corp.*, No. CIV A 3:96-CV-3353-D, 1998 WL 872511, at *2-3 (N.D. Tex. Nov. 30, 1998); *Ben-Hur v. Equifax Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997); *Way v. Barr*, No. HAR 94-2519, 1995 WL 307525, at *2 (D. Md. May 15, 1995) (construing Section 618 as well as parallel state statute of limitations); *Edgar v. Reich*, 881 F. Supp. 83, 84-87 (D. Mass. 1995); *Wilson v. Porter, Wright, Morris & Arthur*, 921 F. Supp. 758, 759-61 (S.D. Fla. 1995); *Scott v. Newsday, Inc.*, No. 88-0152, 1989 WL 20598, at *5 (E.D.N.Y. Mar. 3, 1989) (construing parallel state statute). One district court opinion suggests in dictum that a general discovery rule would apply to Section 618, *see Mgmt. Info. Tech., Inc. v. Alyeska Pipeline Serv. Co.*, No. 92-1730, 1993 WL 219257, at *4-6 (D.D.C. June 8, 1993) (Sporkin, J.), and another has actually applied the discovery rule to save a claim under the Act. *See McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999). Neither case, however, attempts to reconcile its holding with the language, structure, or history of the Act.

issue had rejected the suggestion that the statute of limitations in Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681p, implicitly incorporates a discovery provision applicable to all claims under the Act. In departing from this view, the Ninth Circuit did not—and could not—suggest that Congress intended to incorporate such a provision into Section 618. The text of that section, the overall structure of the Act, and the Act's history all demonstrate that Congress did not. Moreover, the novel presumption that the Ninth Circuit invoked to justify its conclusion is baseless and, in any event, is rebutted by the clear intent of Congress. The decision below should be reversed.

[6] Financial Institutions and the Fair Credit Reporting Act, Q&A 59 (1971), *reprinted in* Consumer Credit Guide (CCH) ¶¶ 26,701, 26,709 (1999) ("Any action must be brought within two years from the date on which the liability arises, except in certain situations where there has been a material and willful misrepresentation, in which case the action may be brought within two years after discovery."); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (noting that informal agency interpretations are "entitled to respect") (quotation omitted).

[7] *See* Ralph C. Clontz, Jr., *Fair Credit Reporting Act Manual* ¶ 2.07[1], at 2-23 (Supp. 1989); Calvin C. Corman, *Limitation of Actions* 280-81 (Supp. 1993); Blair Drazic, *Handling Credit Reporting Cases* § 7:7, at 7-14 to 7-15 (1995); 15A Am. Jur. 2d, *Collection and Credit Reporting Agencies* § 64, at 237 (2000). A treatise published by the National Consumer Law Center also recognized that the FCRA generally "provides for a two year limitation period from the date on which the liability arises, not from when the consumer discovers the violation." William P. Ogburn, *Fair Credit Reporting Act* § 12.10.1, at 289 (4th ed. 1998). The most recent supplement to this treatise asserts that courts will "apply the discovery rule even to the Act's general statute of limitations" in light of the "injustice of th[e opposite] result," but fails to offer any additional rationale in support of that position. Ogburn, *Fair Credit Reporting Act* § 12.10.1.1, at 117 (Supp. 2000).

I. THE STATUTE OF LIMITATIONS IN THE FAIR CREDIT REPORTING ACT DOES NOT INCORPORATE A GENERAL DISCOVERY RULE.

As this Court has repeatedly pointed out, "'the starting point for interpreting a statute is the language of the statute itself.'" *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 25 (1989) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). "And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). Here, the text of the Act precludes the general discovery rule the Ninth Circuit implied into the FCRA.

A. The Statute of Limitations in Section 618 Generally Begins to Run When Liability Arises, Not Upon Discovery of Injury or Other Facts.

Section 618 does not normally condition the running of the Act's statute of limitation on the discovery of any fact. Quite the contrary, it adopts the traditional commencement rule beginning the statute when the formal right to sue under the Act attaches.

Under the traditional commencement rule, statutes of limitations begin to run when the plaintiff has a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see also Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874) ("All statutes of limitations begin to run when the right of action is complete . . . ."). In other words, limitations periods traditionally begin to run "at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty . . . even though the plaintiff was unaware of the accrual of his or her cause of action." II Calvin C. Corman, *Limitation of Actions* § 11.1.1, at 134 (1991); *see also Restatement (Second) of Torts* § 899, cmt. e (1979); (noting that statutes of limitations ordinarily begins to run when "from the time the tort was committed although the injured person

has no knowledge or reason to know of" the tort committed against him) 2 H.G. Wood, *Limitation of Actions* § 276c, at 88-90 (4th ed. 1916) ("Mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations unless there has been fraudulent concealment on the part of those invoking the benefit of the statute.")

The traditional rule is still the norm in most areas of the law. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see generally* II Corman, *Limitation of Actions* § 11.1.1, at 134. Since the middle of the last century, the discovery rule, which delays the running of the statute of limitations until discovery of injury or some other crucial fact, has been extended outside the fraud context in which it was originally developed into areas such as medical malpractice and products liability. *See generally* II Corman, *Limitation of Actions* § 11.1. The rule is not, however, generally applied to defamation and invasion of privacy, the types of claims normally brought in connection with credit reporting, *see, e.g.*, Francis M. Dougherty, *Limitation of Actions: Time of Discovery as Determining Accrual of Action*, 35 ALR 4th 1002 § 2 (1985), and it was clear at the time the FCRA was enacted that credit reporting claims were subject to the traditional commencement rule, not the discovery rule. *See, e.g., Wilson v. Retail Credit Co.*, 457 F.2d 1406 (5th Cir. 1972); *Atwell v. Retail Credit Co.*, 431 F.2d 1008 (4th Cir. 1970); *Peacock v. Retail Credit Co.*, 302 F. Supp. 418, 422 (N.D. Ga. 1969), *aff'd*, 429 F.2d 31 (5th Cir. 1970); 50 Am. Jur. 2d *Libel and Slander* § 390, at 912 (1970). As federal statutes covering areas traditionally regulated by the common law are presumed to retain long-established principles, the FCRA would have to adopt the discovery rule directly to depart from that tradition. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

Far from abandoning the traditional commencement rule, Section 618 expressly embraces it. Section 618 states that

"[a]n action to enforce any liability created under this subchapter may be brought . . . within two years from the date on which *liability arises*." 15 U.S.C. § 1681p (emphasis added). Under the Act, however, liability does not arise when a consumer learns that he or she has been injured or that a violation of the Act has occurred. Instead, the Act makes a person who is "negligent in failing to comply with any requirement imposed" by the Act with respect to a consumer "liable to that consumer in an amount equal to the sum of [] any actual damages sustained by the consumer as a result of the failure." *Id.* § 1681o(a); *see also id.* § 1681n(a) (providing for punitive and statutory as well as compensatory damages for willful violations). Thus, where, as here, a consumer seeks damages from a credit reporting agency for improperly disclosing credit information, the statute of limitations begins to run when the disclosure is made, because it is at that point that the agency violates the Act, the consumer's intent in keeping credit information private is invaded, and the agency becomes liable for any alleged damages.

This conclusion is supported by this Court's construction of similarly worded statutes of limitations. For example, in *McMahon v. United States*, 342 U.S. 25 (1951), this Court considered the statute of limitations in the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-52, which requires suits under that act to "be brought within two years after the cause of action arises." 46 U.S.C. App. § 745. The plaintiff in *McMahon* contended that the limitations period did not begin running until the Government disallowed his administrative claim because the Suits in Admiralty Act barred him from suing until that denial. *See McMahon*, 342 U.S. at 26. This Court disagreed. It held that "the proper construction of the language used in the Suits in Admiralty Act is that the period of limitation is to be computed from the date of injury." *Id.* at 27; *see also id.* (noting that the plaintiff's interpretation would permit claimants to "postpone indefinitely" the running of the statute of limitations).

In a more recent case, this Court reached a similar conclusion. It observed that a statute of limitations commencing when "the cause of action arose," 29 U.S.C. § 1451(f)(2), "incorporates the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings*, 312 U.S. at 98). Thus, this Court's decisions recognize that the language in Section 618 is most naturally read to incorporate the traditional commencement rule, not the discovery rule.

Nor is there any reason to think that Congress meant to incorporate the discovery rule when it used language expressing the traditional rule. Congress knows how to incorporate the discovery rule into a statute of limitations. In more than a dozen statutes enacted since 1933, Congress has explicitly linked the commencement of a limitations period to discovery of a claim or fact. *See, e.g.*, 15 U.S.C. § 77m (authorizing securities claims brought within one year "after the *discovery* of the untrue statement") (emphasis added).[8] Other

[8] *See also* 5 U.S.C. § 6304(e) (authorizing claims for annual leave payments brought within three years "immediately following the date of *discovery* of the error") (emphasis added); 10 U.S.C. § 1552(b) (authorizing claims to correct military records brought within three years after claimant "*discovers* the error or injustice") (emphasis added); 12 U.S.C. § 1715z-4a(d) (authorizing certain housing claims brought within six years after the government "*discovers* any use of project assets and income in violation of the regulatory agreement" or other applicable rule or regulation) (emphasis added); 12 U.S.C. § 3416 (authorizing claims brought within three years of "the date of *discovery* of [the] violation") (emphasis added); *id.* § 77www(a) (authorizing claims "brought within one year after the *discovery* of the facts constituting the" claim) (emphasis added); *id.* § 78i(e) (same); *id.* § 78r(c) (same); *id.* § 78cc(b) (same); *id.* § 3006(c) (authorizing claims filed within three years of "the *discovery* of the alleged violation upon which such civil action is based") (same); *id.* § 1711(a)(2) (claims must be brought within three years of "*discovery* of the violation or after discovery should have been made by the exercise of reasonable diligence") (emphasis added); *id.* § 6104(a) (authorizing

statutes commence the limitations period when the plaintiff "knew or should have known" of a claim or facts relating to its claim,[9] and still others provide that the statute of limitations commences running upon actual knowledge of some fact.[10] Moreover, in enacting the FCRA, Congress did not simply overlook the special case of when a plaintiff is not immediately aware of his or her injury. Congress was well aware that, because consumers are not directly involved in the sale and use

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claims brought "within three years after *discovery* of the violation") (emphasis added); 18 U.S.C. § 2710(c)(3) (authorizing claims brought by "the date of *discovery*") (emphasis added); 19 U.S.C. § 1621 (authorizing claims "commenced within five years after the time when the alleged offense was discovered"); 26 U.S.C. § 7431(d) (authorizing claims brought within two years "after the date of *discovery* by the plaintiff of the unauthorized inspection or disclosure") (emphasis added); 42 U.S.C. § 9612(d)(2)(A) (authorizing claims for recovery of damages brought within three years of the "date of the *discovery* of the loss and its connection with the release in question") (emphasis added); *id.* § 9613(g)(1) (same).

[9] *See, e.g.*, 28 U.S.C. § 2409a(g) (deeming quiet title claims against United States to accrue on "the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States"); 28 U.S.C. § 2416 (providing that, for suits brought by the United States, the statute of limitations does not run until "facts material to the right of action are [] *known* [or] *reasonably could* [] *be known* by an official . . . charged with the responsibility to act in the circumstances"); 31 U.S.C. § 3731(b) (authorizing claims brought within three years of "the date when facts material to the right of action are known or reasonably should have been known"); 18 U.S.C. § 2520(e) (authorizing claims brought within "two years after the date upon which the claimant first has a reasonable opportunity to discover the violation").

[10] *See, e.g.*, 5 U.S.C. § 8477(e)(6)(B) (providing that claim must be filed within three years from "the earliest date on which the plaintiff had actual knowledge of the breach or violation"); 29 U.S.C. § 1113(2) (authorizing actions brought within three years of the "date on which the plaintiff had actual knowledge of the breach or violation"); *see also* 7 U.S.C. § 2566(a) (providing that "[n]o recovery shall be had for that part of any infringement committed more than six years (or known to the owner more than one year) prior to the filing of the complaint or counterclaim for infringement in the action").

of credit reports, they are often not immediately aware that they have been damaged by an adverse credit report. *See* S. Rep. No. 91-517, at 3 (1969); *see also infra* pp. 35 - 36 (discussing congressional hearings). Thus, there is no reason to think that, when Congress stated that the statute of limitations in Section 618 commences when "liability arises," 15 U.S.C. § 1681p, it really meant the statute to commence upon discovery of some fact that may not occur until long after the defendant becomes subject to liability. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted).

This Court's occasional incorporation of the discovery rule into statutes of limitations that commence upon "accrual" of a claim does not suggest otherwise. While this Court has generally interpreted such statutes to begin running when there is a "a complete and present cause of action," *Rawlings*, 312 U.S. at 98, it has sometimes indicated that the discovery rule governs certain claims under a statute of limitations commencing upon accrual. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 120 (1979) (indicating that the discovery rule applies to medical malpractice claims under the statute of limitations in the Federal Torts Claim Act, 28 U.S.C. § 2401(b)); *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (indicating that the discovery rule applies to latent injuries under the statute of limitations in the Federal Employers' Liability Act, 45 U.S.C. § 56). These decisions do not, however, suggest any general warrant to disregard the plain language of statutes of limitations; instead, they reflect the elastic nature of the word "accrual."

The word "accrue" is defined to mean "to come into existence as an enforceable claim." *Webster's Third New Int'l Dictionary* 13 (1976); *accord Black's Law Dictionary* 21 (7th ed. 1999). As a consequence, a statute conditioned upon the

"accrual" of a claim can be interpreted to commence when a claim becomes formally enforceable (the traditional rule) or when it becomes practically enforceable (the discovery standard). Accordingly, as this Court has long observed, the word accrue lacks any "'definite technical meaning,'" and statutes of limitations predicated upon accrual must be interpreted "'in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.'" *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co. v. Koons*, 271 U.S. 58, 61-62 (1926)).

The phrase "liability arises" is not so malleable. The point at which liability attaches is determined by the substantive provisions of a statute. As a consequence, a limitations period predicated upon liability does not permit courts to engage in the sort of broad ranging policy inquiry that an accrual statute invites. No doubt because of this fact, Congress has used a variation of the phrase "liability arises" to distinguish the traditional commencement rule from the discovery rule. *See, e.g.*, 29 U.S.C. § 1451(f)(1) (providing that an action may not be brought after the later of "6 years after the date on which the *cause of action arose*" or 3 years after discovery) (emphasis added); *id.* § 1303(e)(6) (same); *id.* § 1303(f)(5) (same); *id.* § 1370(f) (same). Thus, the fact that this Court occasionally construes an "accrual" statutes to incorporate the discovery rule simply underscores Congress' decision to use language in Section 618 that cannot be interpreted to do so.

B. The Limited Discovery Provision in Section 618's Misrepresentation Exception Precludes Implication of a More General Discovery Rule.

In addition to incorporating the traditional commencement rule, Section 618 also expressly includes a limited discovery rule that applies when certain misrepresentations are made. This express exception to the traditional commencement rule

precludes implication of a general discovery rule into that section.

1. Section 618's Express Exception for Certain Misrepresentations Precludes Implication of Additional Unstated Exceptions.

Under the misrepresentation exception, where a defendant has "materially and willfully misrepresented any information required under this subchapter to be disclosed," and the information misrepresented is "material to the establishment of the defendant's liability . . . . under this [title]," a claim based upon that liability may be brought "within two years after discovery by the individual of the misrepresentation." 15 U.S.C. § 1681p.[11] The presence of this express exception to the general rule governing claims under the Act precludes implication of an unstated exception such as a general discovery rule.

It is well-settled that where Congress explicitly enumerates exceptions to a statute, additional unstated exceptions generally cannot be implied into the statute. *See, e.g., United States v. Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions [in the FTCA] convinces us that the Ninth Circuit erred in inferring a third exception . . . ."); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary

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[11] The misrepresentation exception provides in full:

> where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p.

legislative intent."); *American Bank & Trust Co. v. Dallas Cty.*, 463 U.S. 855, 864 (1983) ("From the specific exceptions for franchise and estate and inheritance taxes, and the conspicuous omission of share taxes from that group, only one inference is possible: Congress meant to bar share taxes . . ."); *see generally* 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:23, at 317 (6th ed. 2000).

As previous decisions of this Court make clear, this interpretive principle applies to statutes of limitations and, in particular, to doctrines affecting the running of such statutes. For example, in *United States v. Brockamp*, 519 U.S. 347 (1997), this Court reversed a Ninth Circuit decision (which, like the decision below, contradicted all other circuits to consider the issue) holding that a limitations provision in the Internal Revenue Code contains an implicit equitable tolling exception. *See id.* at 348-49. Although there is a long-standing presumption that federal statutes of limitations incorporate equitable tolling doctrines, this Court found the presumption rebutted by the language of the provision because, among other things, that language "sets forth explicit exceptions to its basic time limits" that "do not include 'equitable tolling.'" *Id.* at 351; *see also id.* at 352 (noting that the statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and *the explicit listing of exceptions*" preclude the implication of any equitable exceptions) (emphasis added). Similarly, this Court has refused to permit equitable tolling of the limitations period in the Quiet Title Act, 28 U.S.C. § 2409a, because the statute contains an express exception for plaintiffs justifiably unaware of a claim by the United States. *See United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *see also Soriano v. United States*, 352 U.S. 270, 275-76 & n.7 (1957) (refusing to imply equitable tolling for time of war in light of statutes passed to provide such tolling). Where, as here, unstated exception would replace rather than incorporate a traditional doctrine, the

presence of an express exception even more clearly precludes the unstated one.

2. A General Discovery Rule Would Render the Limited Discovery Provision in the Misrepresentation Exception Superfluous.

The misrepresentation exception also precludes the implication of a general discovery rule because such a rule would render the limited discovery provision in the exception superfluous and read out of the Act the misrepresentation requirement upon which Congress specifically conditioned application of the discovery rule.

The misrepresentation exception is primarily concerned with misrepresentations by credit reporting agencies concerning reports that contained inaccurate information or that were disclosed to improper parties. By delaying the running of the statute of limitations when a credit reporting agency makes misrepresentations material to potential inaccuracy or improper disclosure claims against them, the exception prevents credit reporting agencies from concealing the basis of such claims from consumers and then invoking the statute of limitations when the consumer is unable to bring his or her claims within the limitations period. Thus, if a credit reporting agency improperly discloses a report to a party and then fails to identify that party when the consumer seeks to know who has received reports about her, as the Act entitles her to do, *see* 15 U.S.C. § 1681g(a)(3), the misrepresentation exception delays the commencement of the statute of limitations until the consumer learns of the concealed disclosure. Similarly, if a credit reporting agency provides a user with inaccurate information on a consumer and then hides that information when the consumer invokes her right to inspect the information in her file, *see id.* § 1681g(a)(1), the exception delays the limitations period until discovery of the concealed information.

As a practical matter, a general discovery rule would operate in exactly the same manner. In the first place, such a rule would apply where the misrepresentation exception applies. Discovery rules are normally intended to protect would-be plaintiffs who are "blamelessly ignoran[t]" of their claims under the Act. *Urie*, 337 U.S. at 170; *see generally* II Corman, *Limitation of Actions* § 11.1.1, at 34. A consumer who is unaware of a misrepresentation about an improper disclosure or about the existence of inaccurate information in her files is ignorant of her claims, and if a consumer has sought information in her files that would reveal those claims but that information is misrepresented, that consumer can hardly be blamed for not yet discovering the claims. Thus, where a plaintiff is able to invoke the misrepresentation exception, the plaintiff is also blamelessly ignorant of her claims and therefore protected by a general discovery rule.

Second, the limitations period under a general discovery rule would commence at the same time as the period under the exception's limited discovery provision because a party discovering a misrepresentation about an improper disclosure or the existence of inaccurate information in her file will discover her claims for inaccuracy and improper disclosure at the same time, and visa versa. Third, under a general discovery rule, the statute of limitations would run for the same two-year period as the limited discovery provision in the misrepresentation exception because that provision uses the same two-year period as Section 618 in general. *See* 15 U.S.C. § 1681p. Thus, a general discovery rule would apply in the same circumstances as the misrepresentation exception and delay the statute of limitations in the same manner as the exception's discovery provision, thereby rendering the exception superfluous.

Because a general discovery rule would effectively read the misrepresentation requirement Congress specifically imposed on the discovery rule in Section 618 out of the Act, any

interpretation of the Act that unnecessarily implies such a rule into Section 618 must be rejected. As this Court has repeatedly recognized, it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *see also Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to 'give effect, if possible, to every clause and word of a statute.'") (quoting *Inhabitants of the Township of Montclair v. Ramsdell*, 107 U.S. (17 Otto) 147, 152 (1883)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). As a general discovery rule would basically swallow the limited discovery provision in the misrepresentation exception, such a rule cannot be implied into Section 618.

II. THE GENERAL DISCOVERY RULE CONFLICTS WITH THE STRUCTURE OF THE FAIR CREDIT REPORTING ACT

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Adm'n v. Brown & Williams Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Here, the overall structure of the Act reinforces what the language of Section 618 demonstrates: that the section does not incorporate a general discovery rule. Indeed, a general discovery rule would upset the balance struck by Congress in Section 618.

A. The Notification and Access Provisions of the FCRA Ensure Prompt Discovery of Violations of the Act.

The carefully crafted notice and access provisions in the FCRA make a judicially implied discovery rule both unnecessary and inappropriate.

The FCRA imposes a number of notification requirements that inform consumers about the disclosure and use of their credit information. For example, to obtain an "investigative consumer report"—the intrusive sort of report containing not only financial information, but also "information on a consumer's character, general reputation, personal characteristics, or mode of living" (15 U.S.C. § 1681a(e))—a would-be user must "clearly and accurately disclose[] to the consumer" that such a report may be requested. *Id.* § 1681d(1). Similarly, to obtain even a regular credit report for employment purposes, an employer must normally provide a "clear and conspicuous disclosure" to the consumer that such a report may be requested and obtain the consumer's written authorization for doing so. *Id.* § 1681b(b)(2)(A).

Even more importantly, the Act requires disclosure of adverse actions taken, in whole, on the basis of a consumer report. The Act states that "[i]f any person takes adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the consumer must be notified of the action and the agency that supplied the report. 15 U.S.C. § 1681m(a). Moreover, the Act defines adverse action broadly to include the denial of credit, insurance, employment, public licenses or benefits, or any other action taken in connection with a transaction by the consumer that is adverse to the consumer's interest. *See id.* §§ 1681a(k), 1691(d)(6).

As pointed out above, *see supra* pp. 4, 23, the FCRA also entitles consumers to access files kept on them by consumer reporting agencies and information concerning the use of those

files. For example, upon a consumer's request, the Act requires agencies to disclose "[a]ll information in the consumer's file at the time of the request." 15 U.S.C. § 1681g(a)(1). In addition, the Act entitles consumers to "[i]dentification of each person . . . that procured a consumer report . . . during the 1-year period preceding the date on which the request is made." *Id.* § 1681g(a)(3)(A); *see also id.* § 1681(a)(3)(A)(i) (requiring identification of persons requesting reports for employment purposes for a two-year period). Other access provisions entitle consumers to know the sources of most of the information in the files, as well as information concerning delinquent checks and prescreening inquiries for mass solicitations. *See id.* §§ 1681(g)(a)(2), (a)(4) & (a)(5).

These notification and access provisions work together to enable consumers to discover violations of the Act in a timely fashion. For example, if an individual is denied credit, insurance, or employment because of inaccurate information in a credit report, the Act's notification provisions require that the individual will be notified that the denial resulted from the report, and the access provisions entitle that individual to discover the inaccuracy in the report. Moreover, to facilitate this process, consumers seeking access within sixty days of notification of an adverse action have the right to review their file free of charge. *See* 15 U.S.C. § 1681j(b). *But see id.* § 1681j(a)(1)(A) (providing that the fee otherwise payable for access shall not exceed $8, adjusted for inflation). Similarly, when an investigative consumer report is requested improperly, the Act's notification provisions require that the consumer be informed of the request, and the access provisions entitle him to discover the improper nature of the request by demanding to know the nature and scope of the investigation, as well as the identity of that party. *See id.* §§ 1681d(b), 1681g(a)(3)(A). Thus, the FCRA provides consumers with the means to discover quickly any improper disclosure of an investigative

report and any inaccurate information in their files that has harmed them.

Because the Act does not require notification of every request for an ordinary credit report, it does not provide consumers with automatic notification of every potentially improper disclosure of a credit report. Nonetheless, the access provisions provide consumers with a powerful tool for discovering any disclosures of financial information which, while not resulting in any adverse actions, nonetheless invade their privacy. First, as the FTC and privacy advocates recommend, consumers can monitor their credit files for any such disclosures by requesting copies of their files once a year.[12] Indeed, petitioner made available to every consumer a free copy of his or her file disclosure once each year, regardless of whether the consumer recently had been advised of an adverse action based upon a credit report. SER 842.

Second, as the facts of this case demonstrate, the FCRA's access provisions enable consumers to identify improper disclosures quickly once they have reason to suspect such a disclosure. In meeting with a lending institution on May 31, 1995 to discuss refinancing her home mortgage, respondent learned that there was a problem with her credit report, and by requesting access to her file, within less than one week she was able to learn that reports on her had been disclosed to Prime Cable, FCNB, and other businesses in Las Vegas, that a delinquent account at Dillard's was being attributed to her (in Trans Union's files), and that an imposter had assumed her identity. *See supra* pp. 6 - 7. Thus, by using the FCRA's

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[12] *See, e.g.*, Federal Trade Comm'n, *ID Theft: When Bad Things Happen to Your Good Name, available at* http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.htm (recommending that consumers "[o]rder a copy of your credit report from the three credit reporting agencies every year") (visited 4/17/01); Privacy Rights Clearinghouse, *Fact Sheet #1: Privacy Survival Guide—How to Take Control of Your Personal Information, available at* http://www.privacyrights.org/fs/fs1-surv.htm (same) (visited 4/17/01).

access provisions, respondent discovered the basis for the improper disclosure claims before this Court less than one year after the first allegedly improper disclosure occurred—and more than a year before the limitations period on the first disclosure before this Court expired.

B. A General Discovery Rule Would Upset the Balance Struck by Congress in the Act.

By providing an unnecessary alternative mechanism for ensuring discovery of claims before the statute of limitations expires, a general discovery rule would upset the balance that Congress struck in setting the limitations period in Section 618 and fixing the document retention requirement in Section 609.

Statutes of limitations strike a balance between competing interests. On the one hand, the public has an interest in "'protecting valid claims.'" *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). On the other hand, both defendants and the public have significant interests in repose, which is the "basic objective . . . that underlies limitations periods." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997). For example, statutes of limitations are "relied upon to project the liabilities of persons and corporations active in the commercial sphere," *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988); *accord Wilson*, 471 U.S. at 275 n.34, and they establish a "deadline after which the defendant may legitimately have peace of mind," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980); *see generally* Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. Chi. L. Rev. 1175, 1182 (1986). In addition, statutes of limitations limit the litigation of claims after memories have faded, witnesses have disappeared, and other evidence has disappeared. *See, e.g.*, *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *see also* Epstein, *supra*, at 1181-82 (noting that stale claims increase "the expense of litigation and the error rate"). Accordingly, a statute of limitations "reflects a value judgment

concerning the point at which interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson*, 421 U.S. at 463-64; *see also Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 139 (1879) (noting that statutes of limitations are "vital to the welfare of society" and "approved in all systems of enlightened jurisprudence").

The addition of a discovery rule to a statute of limitations significantly alters this balance. By delaying the commencement of the limitations period where applicable, a discovery rule increases the effective length of time during which a defendant is subject to suit. *See Klehr*, 521 U.S. at 187 (noting that a discovery rule that "lengthens the limitations period dramatically" conflicts with the statute of limitations' "basic objective" of ensuring repose); *id.* at 199 (Scalia, J., concurring in part and concurring in the judgment) ("[A]ny period of limitation is utterly meaningless without specification of the event that starts it running."). In so doing, the rule affords greater protection to valid claims (so long as a plaintiff acts diligently). At the same time, however, by increasing the effective period in which claims may be brought, the discovery rule decreases the certainty the statute affords and increases the risk of litigating stale claims. Thus, application of the discovery rule tips the balance struck by a statute of limitations in favor of protecting claims and against repose.

Moreover, under the FCRA, a general discovery rule would have an especially great impact on the policies favoring repose because, in addition to imposing increased uncertainty upon credit reporting agencies, the rule would directly increase their costs of doing business. Credit reporting is an information business. The industry sells more than 550 million reports each year, which translates into approximately 2 million reports each work day. *See* Ogburn, *Fair Credit Reporting Act* § 1.2, at 27. Moreover, the national credit bureaus alone maintain files on nearly two hundred million consumers, which files are updated

monthly with more than two billion pieces of information. *See id.* By extending the effective length of time in which claims may be brought, a general discovery rule would require credit reporting agencies to retain records for longer periods of time, thereby adding to the credit industry's already massive burden of storing information.

By contrast, a general discovery rule would not significantly further the public's interest in protecting valid claims. The notice and access provisions of the Act ensure that, absent a misrepresentation triggering the limited discovery provision in the misrepresentation exception, consumers will discover most serious claims under the Act well within the limitations period. As explained above, the Act's notification provisions ensure that consumers are informed of any denial of credit, loss of employment, or other adverse action taken as a result of inaccurate credit reports. *See supra* p. 26. The Act also entitles plaintiffs to notification when any intrusive investigative report has been requested. *See id.* As the Act also provides for consumer access to their files, *see supra* pp. 26-27, it enables consumers to discover claims based upon inaccuracy or improper disclosure of investigative reports quickly after they arise, thereby eliminating the need for a broad discovery rule. Moreover, while the Act does not guarantee notice of the disclosure of ordinary credit reports, it does provide consumers with access to their files, which, as the facts of this case demonstrate, allows plaintiffs claiming improper disclosure to discover such disclosures almost as soon as they have reason to suspect them. *See supra* pp. 28-29. Thus, the need for a general discovery rule under the FCRA is limited at best.

Nor can a general discovery rule be justified by the possibility that some plaintiffs with claims for the improper disclosure of financial information may not have reason to inspect their files for such disclosures. Far from suggesting that concern over this narrow class of claims justifies a general discovery rule covering all claims under the FCRA, Congress

has clearly indicated the opposite in Section 609 of the Act. In that section, Congress requires disclosure to consumers of the identity of persons procuring consumer reports as well as any ultimate end-users of such reports. *See* 15 U.S.C. § 1681g(a)(3). However, recognizing the cost to the industry of retaining such records, Congress limited this obligation to the "1-year period preceding the date on which the request [for disclosure to the consumer] is made." *Id.* § 1681g(a)(3)(A)(2); *see also id.* § 1681g(a)(3)(A)(1) (noting that the identities of individuals requesting reports for employment purposes must be provided for a two-year period). Indeed, when the FCRA was initially enacted, the Act only required that this information be provided for a six month period prior to the disclosure request. *See* FCRA, Pub. L. No. 91-508, § 609, 84 Stat. 1131. Obviously, if Congress had seen a compelling need to protect claims of improper disclosure that might not be discovered immediately and was willing to extend the practical length of the limitation period, it would not have effectively authorized credit reporting agencies to destroy key evidence concerning such disclosures within any version of the stated limitations period. Thus, Section 609 demonstrates that Congress did not consider ordinary improper disclosure claims to warrant protection for two years beyond the date of the disclosure, much less a discovery rule effectively extending the limitations period on all types of claims under the Act.

C. Even Without a General Discovery Rule, Section 618 Improves the Ability of Consumers to Bring Credit Reporting Claims.

It is particularly inappropriate for the Ninth Circuit to rewrite the text of the FCRA and upset the balance struck by the Act by adding a general discovery rule because the Act already ensures fair treatment of would-be plaintiffs with credit reporting claims.

When the FCRA was enacted in 1970, consumers did not have any right to notice that credit or even investigative reports

on them had been requested, and they had no right to access their files. *See, e.g., Wilson v. Retail Credit Co.*, 438 F.2d 1043, 1045 (5th Cir. 1971); *see generally* Virginia G. Mauer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 99-100 (1983). The statutes of limitations governing defamation and invasion of privacy claims, the theories normally employed in credit reporting cases, were generally less than two years long, *see, e.g., Wilson*, 438 F.2d at 1045 (applying one-year limitations period); *see generally* 50 Am. Jur. 2d, *Libel and Slander* § 390, at 911; 62A Am. Jur. 2d, *Privacy* § 176, at 793-94 (1990), and those statutes generally began running upon disclosure of a credit report whether or not the consumer was aware of a claim, *see supra* p. 15. As a consequence, before the FCRA was passed, plaintiffs bringing credit reporting claims often had no way to discover their claims before the short statutes of limitations applicable to them expired. *See* Blair Drazic, *Handling Credit Reporting Cases* § 7:7, at 7-11 to 7-12 (1995); *see also* Maurer, *Common Law Defamation and the FCRA*, 72 Geo. L.J. at 99-100 (noting that a defamation plaintiff was "unlikely to discover the existence of the erroneous information at the root of his credit problems until the statute of limitations precluded relief"). Thus, even without a general discovery rule, through its notice and access provisions, the FCRA placed consumers bringing claims under the Act in a far better position to discover and bring claims within the relevant limitations period than they had previously enjoyed.

Moreover, the FCRA leaves consumers free to take advantage of subsequent favorable developments in state law. In recent years several states have extended a discovery rule to cover defamation claims involving credit reports, *see, e.g., Sears, Roebuck & Co. v. Ulman*, 412 A.2d 1240, 1243-44 (Md. 1980); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 334 N.E.2d 160, 164-65 (Ill. 1975), and some states have fair credit reporting statutes that explicitly incorporate general discovery provisions. *See* Cal.

Civ. Code § 17853; Ga. Code Ann. § 10-1-401(a); Ohio Rev. Code Ann. § 3904.21(D).[13] By providing that the Act generally "does not annul, alter, affect, or exempt any person" from complying with state tort law, 15 U.S.C. § 1681t(a), the FCRA permits plaintiffs to bring credit reporting claims under state law and take advantage of such developments. *See, e.g.*, *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227-29 (3d Cir. 1997) (permitting plaintiff to sue under state statute); *Catrone v. Thoroughbred Racing Ass'n of N. Am., Inc.*, 929 F.2d 881, 888-89 (1st Cir. 1991) (permitting common law claim). Thus, while Section 618 requires consumers bringing claims under the FCRA's specialized causes of action to rely on the Act's notice and access provisions to discover such claims, it leaves them free to take advantage of any state laws subject to statutes of limitations incorporating the general discovery rule or other more liberal limitations provisions.

Finally, while statutes of limitations inevitably impose "the price of occasional unfairness in individual cases," *United States v. Brockamp*, 519 U.S. at 353, there is no such unfairness here. Despite being initially unaware of the

[13] California's discovery provision has an illuminating history. Prior to 1997, the state's fair credit reporting statute contained a limitations provision patterned after Section 618 that required claims to be brought "within two years from the date on which liability arises." Cal. Stat. 1975, ch. 1271, § 1, at 3377. In 1997, this provision was amended to provide that suits may be brought "within two years from the date plaintiff knew or, or should have known of, the violation of this title. . . ." Amended Cal. Stat. 1997, ch. 768, § 5 (AB 156), 1997 Cal. Legis. Serv. 4169 (West 1997); *see also id.* (providing that claims shall be brought "not more than seven years from the earliest date on which liability could have arisen"). This change was prompted by concern that under the language borrowed from Section 618 "the consumer may not become aware of [a statutory] violation until after the statute of limitations expires. . . ." Cal. Dep't of Consumer Affairs, Recommendation Concerning AB 156, at 6 (Sept. 11 and 12, 1997). Thus, the California legislature amended its fair credit reporting statute to include a general discovery rule because it found that language identical to Section 618 did not incorporate such a rule.

disclosure of her credit reports in connection with the imposter's activities, respondent was able to learn of the imposter's activities more than a year before the statute of limitations had run by invoking the Act's access provisions. *See supra* pp. 6-7. Barring respondent's improper disclosure claims would not be inequitable under those circumstances. Indeed, respondent's year-long delay in bringing the claims in question would preclude respondent from relying upon even an equitable tolling doctrine. *See, e.g., Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990) (holding that "a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable period of time after he has obtained, or by due diligence could have obtained, the necessary information"); *see generally* 54 C.J.S. *Limitation of Actions* § 87b (1987). Thus, the facts of this case underscore that the general discovery rule is not needed to ensure that the Act treats plaintiffs fairly.

III. THE GENERAL DISCOVERY RULE ALSO CONFLICTS WITH THE HISTORY OF THE FAIR CREDIT REPORTING ACT.

Although respondent sought to rely upon the legislative history of the Act in opposing certiorari, *see* Resp. Cert. Opp. at 20-22, there is no reason to consult that history. As this Court has recognized, courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). In any event, nothing in the legislative history even begins to suggest that Congress intended to incorporate the general discovery rule into Section 618. To the contrary, both the legislative history of the Act and its subsequent history confirm that Congress had no such intention.

A. Congress Rejected a Proposal to Incorporate the General Discovery Rule into the Act.

When Congress enacted the FCRA, it was well aware of the problems that consumers faced in discovering injuries caused by credit reporting. In both the House and the Senate, hearings noted the "organized conspiracy of silence," the "wall of silence," and the "shroud of secrecy" then around the credit reporting industry. *See Hearings before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency*, 91st Cong. 270 (1970) [hereinafter "*House Hearings*"]; *Hearings on S. 823, Before the Subcomm. on Financial Institutions of the Comm. on Banking and Currency* 91st Cong. 2 (1969) [hereinafter "*Senate Hearings*"]. Both houses also heard stories of an individual whose career was effectively destroyed by credit records containing false information, without his suspecting that information for years, *see House Hearings* 78-81; *Senate Hearings* 78-89, and the Senate Report specifically recognized that "the inability at times of the consumer to know he is being damaged by an adverse credit report." S. Rep. No. 91-517, at 3.

Even more pertinently, a general discovery rule was specifically suggested to Congress but not adopted. In 1970, a young Professor Arthur Miller, then of the University of Michigan, testified before Congress. *See House Hearings* 182-210. In his prepared statement before the House, Professor Miller recommended that the Act's statute of limitations "should be measured 'from the date of the occurrence of the violation *or the date on which the violation is discovered*.'" *Id.* at 188 (emphasis added). This proposal was not, however, incorporated in any suggested amendment to the credit reporting bills then in Congress or to the amendment to the banking legislation that ultimately became the FCRA. *See generally* Ogburn, *Fair Credit Reporting Act* § 1.4 (discussing the legislative history of the Act); *see also infra* p. 37 (discussing bills). Moreover, when the House demanded

changes to Section 618 in conference, it suggested adding the misrepresentation exception with its limited discovery provision, *see* H.R. Rep. No. 91-1587, at 30 (1970), not the broad ranging discovery rule proposed by Professor Miller or the one implied by the Ninth Circuit in the decision below. Thus, by implying a general discovery rule into Section 618, the Ninth Circuit improperly embraced an innovation specifically rejected by Congress.

B. The Amendment of Section 618 Does Not Support Respondent's Interpretation.

Either unaware or undeterred by these facts, respondent has asserted that the legislative history, and in particular the changes made in conference, supports her position. When the bill that formed the model for the FCRA was introduced in the Senate in January 1969, the statute of limitations in it permitted suits brought "'within two years from the date of the occurrence of the violation.'" 115 Cong. Rec. 2416 (1969) (reading S. 91-823). Bills introduced in the House contained similar language, with the most successful bill providing for a five-year period. *See* H.R. 91-16340, at 10 (1970) (providing for claims brought "within five years from the date of the occurrence of the violation"); H.R. 91-14765, § 617, at 19 (1969) (providing for claims brought "within two years from the date of the occurrence of the violation"). Because these provisions were amended in conference not only to add the misrepresentation exception, but also to require generally that claims be brought "within two years from the date *on which liability arises*," 15 U.S.C. § 1681p (emphasis added); *see also* H.R. Rep. No. 91-1587, at 22, 30 (noting change), respondent argues that Section 618 was changed from a "statute of repose" running upon the occurrence of a violation to a statute of limitations containing a discovery exception. *See* Resp. Cert. Opp. at 20-22. This argument has no merit.

If Congress had meant the last-minute amendments to Section 618 to transform the Act's statute of limitations from

a strict two-year period running from the violation of the Act to one generally running from discovery of injury or some other fact, some discussion of the transformation would be expected. The bill that became the FCRA was drafted with the concerns of the credit reporting industry in mind. *See, e.g.*, Arthur R. Miller, *The Assault on Privacy*, 86 (1971) (claiming that the FCRA was "butchered" by "[i]ndustry lobbyists and bank-oriented senators" in committee); *see also* Max A. Denney, *Federal Fair Credit Reporting Act*, 88 Banking L.J. 579, 583-84 (1971) (describing how industry lobbyists were involved in revising the Act). Moreover, industry officials had complained of the House's proposal to expand the limitations period to five years because the two-year period better reflected existing record keeping practices, *see House Hearings* 145, 464, 614, and they were supported on this point by the President. *See id.* at 555.[14] There is, however, no discussion in the legislative history of the incorporation of the general discovery rule or even a mention of the change in language that respondent finds so momentous. Instead, the conference report and the statements on the floor focus upon the addition of the limited discovery provision in the misrepresentation exception. *See* H.R. Rep. No. 91-1587, at 30; 116 Cong. Rec. 36573 (statement of Rep. Sullivan); 116 Cong. Rec. 35940 (statement of Sen. Proxmire).

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[14] Citing to a statement on the House floor, respondent claims that the Nixon administration publicly supported the five-year limitations period proposed in the House bill. *See* Resp. Cert. Opp. at 21 (citing 116 Cong. Rec. 36576 (1970)). In fact, however, in the passage cited, the sponsor of that bill simply stated that Virginia Knauer, the special assistant to President Nixon for consumer affairs, testified on behalf of the administration and supported the bill, not that she supported the limitations period. *See* 116 Cong. Rec. 36576 (statement of Rep. Sullivan). Moreover, in that testimony, Ms. Knauer clearly stated that she "agree[d] . . . with S. 823, in the provision for a 2-year statute of limitations" because "[t]wo years seems ample time within which consumers can bring their suits without placing too great a recordkeeping burden on the credit reporting agencies." *House Hearings* 555.

Nor does the distinction between statutes of limitations and statutes of repose help respondent. In the first place, respondent reads too much into the concept of a statute of repose. Many definitions of the concept have been suggested, including one which is "synonymous with statute of limitations." I Corman, *Limitation of Actions* § 1.3.2.1, at 30 (1991); *see also Kubrick*, 444 U.S. at 117 (noting that statutes of limitations are "statutes of repose"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (noting that the Clayton Act's limitations provision "is a statute of repose"); *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975) ("It is this interest in finality which underlies the description of a limitations act as a 'statute of repose.'"). Even more importantly, respondent's assumption that statutes of limitations, by definition, incorporate the discovery rule, is incorrect. As demonstrated above, statutes of limitations can, and traditionally do, run without regard to discovery. *See supra* pp. 14-15. Thus, even the legislative history cited by respondent undermines, rather than supports, her claims.

C. Congress Ratified the Case Law Rejecting a General Discovery Rule When It Revised the Act in 1996.

Congress' subsequent treatment of the FCRA also belies respondent's claim that Congress intended to incorporate the general discovery rule into Section 618. In 1996, Congress enacted the Consumer Credit Reform Act, Pub. L. No. 104-208, § 2401 *et seq.*, 110 Stat. 3009-396 to 462, which "revised nearly every section of the FCRA," Ogburn, *Fair Credit Reporting Act* 37, including the Act's civil liability provisions. *See* Pub. L. No. 104-208, § 2412, 100 Stat. 3009-446. In so doing, however, Congress did not amend Section 618. This omission is significant because at the time every court of appeals to consider the question had rejected the suggestion that Section 618 implicitly incorporates the general discovery rule. *See supra* p. 12 n.4. Congress is presumed to be aware of settled judicial interpretation of a statute's language when it

reenacts or amends a statute and to adopt that interpretation when it does not change that language. *See, e.g., Lindahl v. OPM*, 470 U.S. 768, 782 (1985); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . . "). The same presumption should apply where, as here, Congress extensively revises a statute but does not alter sections with a settled meaning. Thus, the 1996 amendments to the Act undermine, rather than support, the claim that Section 618 contains an implied exception for the general discovery rule.

IV. THE PRESUMPTION APPLIED BY THE NINTH CIRCUIT DOES NOT SAVE THE DECISION BELOW.

In holding that the Act incorporates a general discovery rule, the Ninth Circuit did not rely upon the text of Section 618, the structure of the Act, or its legislative history. Indeed, the Ninth Circuit did not even find that Congress intended to imply the discovery rule to the Act. Instead, the Ninth Circuit held that, under the decisions of this Court, the discovery rule applies to all federal statutes of limitations "unless Congress has expressly legislated otherwise." Pet. App. 6a. This was clear error. This Court has never recognized such a presumption in favor of the discovery rule. Moreover, the text of Section 618, the overall structure of the Act, and its legislative history easily rebut any such presumption.

This Court has never clearly recognized that express statutes of limitations such as Section 618 presumptively incorporate the discovery rule. While this Court has twice stated that "federal courts generally apply a discovery accrual rule when a statute is silent on the issue," *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *accord Klehr*, 521 U.S. at 191, it has done so only in cases involving the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, which does not contain any statute of limitations and is therefore entirely silent

on the question of when any limitations period begins. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987). Moreover, while the Court specifically rejected expansive versions of the discovery rule in those cases (requiring discovery of predicate acts and patterns of racketeering as well as injury), it refrained from ruling whether RICO incorporates an injury discovery rule. *See Rotella*, 528 U.S. at 551-54 n.2; *see also Klehr*, 521 U.S. at 198 (concurring in part and concurring in the judgment) (advocating an injury occurrence rule). Furthermore, less than five years ago, this Court indicated that the "standard rule" is that "the limitations period commences when the plaintiff has a 'complete and present cause of action.'" *Bay Area Laundry*, 522 U.S. at 201 (quotation omitted); *see also Kubrick*, 444 U.S. at 120 (noting the general rule that "a tort claim accrues at the time of the plaintiffs' injury"). Thus, it is far from clear whether this Court has embraced any presumption that express statutes of limitations impliedly incorporate the discovery rule.

There are good reasons to reject such a presumption. First, there is no reason to think that Congress expected the discovery rule to be applied to the hundreds of statutes of limitations it has enacted through the years. The normal presumption is that Congress is aware of traditional legal principles and incorporates them unless a contrary statutory intent is evidenced. *See, e.g., United States v. Texas*, 507 U.S. at 334; *Isbrandtsen Co.*, 343 U.S. at 783. Since the discovery rule is not the traditional rule especially for claims analogous to those under the FCRA, *see supra* p. 15, it is unlikely that Congress intended a newer rule of uncertain scope and application to apply absent express language otherwise. Indeed, the dozens of statutes Congress has enacted with explicit discovery provisions (*see supra* pp. 17-18 nn. 8-10) suggest just the opposite.

Second, while the discovery rule has the obvious virtue of protecting plaintiffs who are "blamelessly ignoran[t]" and who

therefore cannot be faulted for failing to file their claims diligently, *Urie*, 337 U.S. at 170, application of the rule interferes with other important policies. As noted above, by extending the period in which claims can be brought for an uncertain and indefinite period of time, the discovery rule undermines the defendant's interest in repose and the interests of the defendant and the public in avoiding litigation of stale claims. *See supra* pp. 29-31. In addition, by raising questions concerning when claims were or should have been discovered, the rule imposes increased transaction costs upon the courts and the parties. As there is no reason to think that these additional costs will be outweighed by the benefits of the discovery rule in all or even most cases, there is no justification for imposing a presumption that upsets Congress' expectations.

Third, the stringent presumption applied by the Ninth Circuit—presuming that the discovery rule applies in the absence of an express statement otherwise—is clearly unjustified. For one thing, this presumption contradicts this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, which was rendered just a year after the FCRA was enacted. In that case, this Court considered the statute of limitations in Section 4B of the Clayton Act, which bars certain claims "unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. Though Section 4B does not expressly reject the discovery rule, this Court nonetheless held that under that provision "a cause of action accrues and the statute begins to run when a defendant commits an act that injures the plaintiff's business." *Zenith*, 401 U.S. at 338. Moreover, while the Court did not explicitly consider the discovery rule in *Zenith*, this Court has recently contrasted the commencement rule adopted in *Zenith* with the discovery rule. *See Rotella*, 528 U.S. 553-54 & n.2; *Klehr*, 521 U.S. at 198 (Scalia, J., concurring in part and concurring in judgment). Thus, *Zenith* cannot be reconciled with the stringent presumption applied by the Ninth Circuit below.

In addition, to the extent that the Ninth Circuit imposed a clear-statement requirement, it was clearly unjustified in doing so. Clear-statement requirements are drastic medicine. Because such requirements "operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them," *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 262 (1991) (Marshall, J., dissenting), they intrude upon Congress' legislative authority and are therefore justified only to protect "independent values of . . . magnitude and constancy" such as federalism and separation of powers concerns. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108-09 (1991); *see generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). Statutes of limitations, however, involve a balancing of competing interests, and judgments concerning their length and operation are therefore "quintessentially the kind of judgment to be made by a legislature." *Malley-Duff*, 483 U.S. at 143 (Scalia, J., concurring); *see also Mills v. Habluetzel*, 456 U.S. 91, 101 n.9 (1982) (noting that statutes of limitations are "best left to legislative determination" and generally legislatures are "free to set periods of limitation without fear of violating some provision of the Constitution"). Thus, a clear-statement requirement in favor of a discovery rule would intrude upon the legislative arena in an area in which courts are least competent do so.

Nor does the authority that the Ninth Circuit cited suggest otherwise. The Ninth Circuit cited this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), in supposed support of its presumption that statutes of limitations incorporate the discovery rule. *See* Pet. App. 6a. Those decisions, however, applied an equitable principle developed in fraud cases: namely, that "where the party injured by fraud remains in ignorance of it without any fault or want of

diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *Lampf*, 501 U.S. at 363 (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)); *see also Holmberg*, 327 U.S. at 397 (quoting same passage from *Bailey*). This narrow principle cannot be mechanically expanded into an across-the-board rule governing all cases. Indeed, as this Court has recognized, the great virtue of this "equitable tolling" doctrine "lies in the very nature of such tolling as the exception, not the rule." *Rotella*, 528 U.S. at 561.

Even more fundamentally, while this Court has long recognized a presumption that statutes of limitations are subject to equitable tolling, *see, e.g.*, *Irwin*, 498 U.S. at 95-96; *Honda v. Clark*, 386 U.S. 484, 501 (1967), it has not required an express rejection of tolling in order to rebut that presumption. To the contrary, it has sought to discern Congress' intent by examining not only the text of a statute of limitations but the structure and policies of the overall legislation as well. *See, e.g., Bennett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-27 (1965). Thus, in order to overcome the presumption in favor of equitable tolling, this Court has required only that there be "good reason to believe that Congress did not want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350; *see also Beggerly*, 524 U.S. at 48 (noting that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute"). Accordingly, in direct contrast to the decision below, this Court has repeatedly held equitable tolling inapplicable based upon the congressional intent *implicit* in a statute of limitations. *See, e.g., Beggerly*, 524 U.S. at 48-49; *Brockamp*, 519 U.S. at 350-53; *Lampf*, 501 U.S. at 363.

In any event, the Act precludes application of the general discovery rule under any presumption or clear-statement requirement. As shown above, *see supra* pp. 14-20, the plain language of Section 618 provides that the limitations period

begins when "liability arises," 15 U.S.C. § 1681p, not upon discovery of injury or some other fact, and the limited discovery provision in the misrepresentation exception prevents implication of an unstated general discovery rule into the section. *See supra* pp. 20-25. In addition, the legislative history shows that Congress rejected a proposal for a general discovery rule, *see supra* pp. 36-37, and such a rule is incompatible with the overall structure of the Act, *see supra* pp. 25-35

Thus, there is more than "good reason" to think that Congress did not want a general discovery rule to apply to the Act. Indeed, even if the discovery rule were subject to a clear-statement requirement as the Ninth Circuit appeared to suggest, the text and structure of the Act would satisfy that requirement because even a clear-statement requirement is not a license to press statutory construction to the "point of disingenuous evasion" or otherwise ignore the terms of a statute. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996) (quotation omitted). Even where a clear-statement rule applies, there must be some plausible construction of the language of the statute to support a construction adopted under the rule. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985); *see also Salinas v. United States*, 522 U.S. 52, 60 (1997) (noting that a plain-statement requirement "does not warrant a departure from the statute's terms"). As the Ninth Circuit did not—and could not—offer such a construction, whatever presumption there may be in favor of such a rule, the general discovery rule cannot be implied into Section 618 of the FCRA.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Ninth Circuit should reversed.

Respectfully submitted,

DANIEL J. MCLOON
EUGENIA L. CASTRUCCIO
JONES, DAY, REAVIS & POGUE
555 West Fifth Street
Suite 4600
Los Angeles, CA 90013
(213) 489-3939

DANIEL H. BROMBERG
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioner TRW Inc.

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